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Supreme Court, U.S.
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No. 96-2032

In The

Supreme Court of the United States

October Term, 1996

ROBERT C. SCHLOTZ AND CINDY J. SCHLOTZ,

Petitioners,

v.

HYUNDAI MOTOR COMPANY, A SOUTH KOREAN CORPORATION; HYUNDAI MOTOR AMERICA, INC., A CALIFORNIA CORPORATION; MITSUBISHI MOTOR SALES OF AMERICA, INC., A DELAWARE CORPORATION, AND WALTER CARL ALBERS,

Respondents.

On Petition For A Writ Of Certiorari To The Minnesota Court Of Appeals

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The Minnesota Court of Appeals held, in Petitioners' words, that "Minn. Stat. § 169.685, subd. 4 barred [their] seat belt claim and the defective seat back claim." (Pet. 5) Thus, while the Court also addressed an issue of federal preemption, its decision is firmly based on its reading of a Minnesota evidentiary statute – an independent and adequate state law ground. That means this Court has no jurisdiction in this case.

Petitioners try to avoid the jurisdictional bar with a constitutional spin on the Minnesota state law question. But the Minnesota Court did not address any federal constitutional challenge to the statute. In truth, Petitioners made no serious federal constitutional challenge below. Anyway, the constitutional argument is fanciful. Minnesota is entitled to enact and apply evidentiary rules of general application, even if they may result in a practical bar on some claim. There is no constitutional infraction in that. In essence, Petitioners ask the Court to address a constitutional argument that they never adequately raised, that was never addressed below, that has limited significance in Minnesota and none elsewhere, and that on the merits is doomed. That compels denial of review.

As to the preemption issue, the Court can reach it only if the independent state law ground fails – if the Court finds a sufficient (and sufficiently preserved) federal question in the state law issue, and resolves it for Petitioners. There is no realistic chance that will happen. That, again, compels denial of review.

In any event, there would be no reason to address the preemption question even if there were jurisdiction. The Minnesota Court of Appeals found that the Supremacy Clause forbids a state common-law claim that takes away a restraint system option that a federal regulation specifically granted, after the regulatory agency determining that options – not a rule requiring any particular restraint

system – best served the federal safety goal.[1] That decision accords with every federal decision on point, and a host of state appellate decisions. It is, in fact, compelled by this Court's own decisions for nearly a century. The few scattered cases that disagree do not create a conflict that warrants review.

Especially in this case. In the vast majority of cases where the FMVSS 208 preemption issue has arisen, the case has involved the question whether federal law preempts a claim that the automobile was defective for lack of an airbag. Petitioners urge that the body of "no airbag" case law makes this case appropriate for review, even though the decision below concerns a factually distinct claim: whether an automobile should have had a manual lap belt in addition to a fully passive two-point belt system. But that is double talk. Petitioners below urged that the "no airbag" case law had no bearing on this case: the "cases and the[ir] analysis do not apply here," Petitioners said. Brief of Appellants, *Schlotz v. Hyundai Motor Co.*, No. C5-96-1207, at 22. They cannot then urge here that those cases make consideration of this one proper.

Just last spring, the Court declined to review the preemption issue in a "no lap belt" case – raised by essentially (in fact, largely verbatim) the same petition. *Zimmerman v. Volkswagen of America, Inc.*, 920 P.2d 67 (Idaho 1996), *cert. denied*, 117 S. Ct. 1245 (March 17, 1997). There is, if anything, less reason to review this case than there was to review *Zimmerman*. *Zimmerman* was decided by a highest state court; here, the decision is by an

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[1] Federal Motor Vehicle Safety Standard 208 ("FMVSS 208"), 49 C.F.R. § 571.208. *See* 49 Fed. Reg. 28962 *et seq.* (1984). The standard was adopted by the Department of Transportation ("DOT") and the National Highway Traffic Safety Administration ("NHTSA"), pursuant to their mandate under the National Traffic and Motor Vehicle Safety Act ("Safety Act"). 49 U.S.C. § 30102 *et seq.* (previously codified at 15 U.S.C. § 1381 *et seq.*).

intermediate state appellate court. Moreover, since *Zimmerman* other courts (including the Ninth Circuit, the Michigan Court of Appeals and the Minnesota Court here) have joined the already huge body of law finding preemption, making the law even more uniform than it was when the Court denied the petition in *Zimmerman*.

The petition should be denied.

REASONS FOR DENYING THE PETITION

The Petition seeks the Court's review of a federal preemption question. (Pet. 25) Almost as an afterthought, the Petition says the Court "should also consider the Minnesota Supreme Court's decision that the seat belt gag rule enacted in 1963 can constitutionally bar the Schlotzes' common law claims."[2] (*Id.*) That is backward. This Court has no jurisdiction to review a state court's decision on a federal question if there is an adequate state law ground for the decision. Accordingly, before the Court even can consider preemption, it must find in the state law question a constitutional issue, and then hold that it destroys the state law ground. Where Petitioners did not properly raise the issue below, the state court did not address it, and it is insignificant anyway, there is no prospect of eliminating the state law ground – a prerequisite to jurisdiction. That alone compels denial of review.

Even apart from the jurisdictional bar, the preemption decision in this case does not warrant review.

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[2] The constitutionality of the state law is such an afterthought that Petitioners did not even set forth the law they challenge in the Statutory Provisions Involved section of their brief. *See* S. Ct. Rule 14.1(f).

I. THE COURT HAS NO JURISDICTION BECAUSE THERE IS AN INDEPENDENT AND ADEQUATE STATE LAW GROUND FOR THE DECISION.

A. The Ruling That State Law Bars Petitioners' Action Forecloses Review Of The Separate Preemption Ground.

This Court sits to decide real questions, not issue advisory opinions. Accordingly, this Court has long held it has no jurisdiction to review a state court's determination of a federal question where the decision rests on an independent and adequate state law ground.

> If the judgment below rested on an independent and adequate state ground, the writ of certiorari should be dismissed as improvidently granted, *Wilson v. Loew's Inc.*, 355 U.S. 597 (1958), for "[o]ur only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. ***We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.***" *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945).

Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 566 (1977) (emphasis added); *see also Lambrix v. Singletary*, 117 S. Ct. 1517, 1522 (1997) (Court "lack[s] jurisdiction to review . . . independently supported judgments on direct appeal: since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory.").

Here, the judgment rests both on preemption grounds and on the Minnesota Court of Appeals' determination that, preempted or not, under Minnesota's own statutory evidence rule, Petitioners' claim fails. As Petitioners put it, "[t]he court also found that the [Minnesota]

seat belt gag rule destroyed the Schlotzes' common law crashworthiness claims." (Pet. 6) That state-law ruling is an independent ground, and the judgment stands under it regardless of any decision this Court might adopt on the preemption issue. There is, accordingly, no jurisdiction to review the judgment below.

B. Petitioners' Failure To Adequately Raise A Federal Constitutional Challenge To Minnesota's Application Of Its Own Statute Forecloses Review.

Petitioners try to avoid the jurisdictional bar on their main issue, by conjuring up an equal protection problem with the Minnesota Court's interpretation of Minn. Stat. § 169.685, subd. 4. But Petitioners concede that "the court of appeals did not address the Schlotzes' constitutional challenges." (Pet. 6) Thus, there is – literally – no decision to review.

The Court generally "will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision [the Court] ha[s] been asked to review." *Adams v. Robertson*, 117 S. Ct. 1028, 1029 (1997) (*per curiam*; dismissing writ as improvidently granted); *see also Heath v. Alabama*, 474 U.S. 82, 87 (1985); *Illinois v. Gates*, 462 U.S. 213, 217-18 (1983); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-35 (1940). Accordingly, "[w]hen the highest state court is silent on the federal question before [it], [the Court] assume[s] that the issue was not properly presented, and the aggrieved party bears the burden of defeating this assumption, by demonstrating that the state court had a 'fair opportunity to address the federal question that is sought to be presented here.' " *Adams*, 117 S. Ct. at 1029 (citations omitted). Supreme Court Rule 14.1(g)(i) tells Petitioners how to meet that burden: specify "the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised;

the method and manner of raising them and the way in which they were passed on by those courts. . . . "

Here, Petitioners have not specified, in accordance with Rule 14.1(g)(i), where and how they made their federal equal protection challenge to Minn. Stat. § 169.685, subd. 4. And the truth is, Petitioners made no real federal constitutional challenge at all. Petitioners' Brief in the Court of Appeals made a perfunctory equal protection argument, but it was directed at the Minnesota constitution and "Minnesota's equal protection test." Brief of Appellants at 42. Petitioners relied on Minnesota, not federal, cases. *Id.* at 41-45. Their brief made passing reference to federal equal protection, but made no mention of the U.S. Supreme Court cases and principles Petitioners now rely on. In fact, the only federal authority Petitioners discussed was *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), urged as support not for a federal constitutional argument, but for the argument that, as a matter of statutory interpretation, Minn. Stat. § 169.685, subd. 4 should not be read to affect unintended "statutory abrogation" of common-law rights.[3] Brief of Appellants at 39.

In the end, Petitioners attack a straw man here: a decision by a different court, in a different case, after the decision here, and on which the decision here necessarily could not have been based. (Pet. 25-28 [citing *Olson v. Ford Motor Co.*, 558 N.W.2d 491 (Minn. 1997)]) The time for petitioning in *Olson* has passed. There is no reason to revive it through the back door, via a case that does not address the issue at all.

In sum, Petitioners seek review of an issue that was not fairly presented to the Court of Appeals, and that was

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[3] *See Adams*, 117 S. Ct. at 1030 ("The discussion of 'a federal case, in the midst of an unrelated argument, is insufficient to inform a state court that it has been presented with a claim' ") (quoting *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 n.9 (1987)).

not decided by that Court, much less by the highest court of the state. There is, accordingly, no "adequate factual and legal record" to "assist [the Court] in [its] deliberations" and "aid in [its] understanding of the [Minnesota statute] as a predicate to [the Court's] assessment of [its] constitutional adequacy." *Adams*, 117 S. Ct. at 1031. The Court should deny certiorari.

C. In Any Event, The New-Found Federal Constitutional Argument Is Not Significant.

On the merits, Petitioners' constitutional argument is muddled. In essence, Petitioners propose that Minnesota cannot, as a matter of its own state policy, determine rules of evidence governing evidence about seat belts. That is, at the outset, an odd proposition. A state is constitutionally entitled to set its own rules of evidence, even if those rules may adversely affect some cases. *See, e.g., Montana v. Egelhoff*, 116 S. Ct. 2013, 2017, 2022-23 (1996) ("any number of familiar and unquestionably constitutional evidentiary rules . . . authorize the exclusion of relevant evidence" and "the introduction of relevant evidence can be limited by the State for a 'valid' reason") (plurality opinion); *Marshall v. Lonberger*, 459 U.S. 422, 438 n.6 (1983). That is all the Minnesota statute does: it even-handedly excludes evidence about installation or use of seat belts – by either party – in automotive litigation. That rule may have the effect of precluding some actions or defenses, both ways, but there is no constitutional affront in that. *See Egelhoff*, 116 S. Ct. at 2071 n.1.

Petitioners object that a purpose behind the rule – to "shield manufacturers from lawsuit should state-mandated seat belts ultimately result in injuries to motorists" (*Olson*, 558 N.W.2d at 495) – no longer is valid. Apparently, the argument is that now the federal government, not the state government, requires seat belts, so the purpose fails. But to the extent Petitioners made an equal

protection challenge below, that was not it.[4] Anyway, Petitioners do not quarrel with the proposition that protection of a manufacturer from liability for following the law's mandate is a rational exercise of state power; it should not matter, then, that the mandate's source is now federal, not state, law. *See Heller v. Doe*, 509 U.S. 312, 319-20, 324 (1993) (legislature "need not actually articulate at any time the purpose or rationale supporting its classification. Instead, a classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification"; "statutory classification fails rational-basis review only when it rests on grounds wholly irrelevant to the achievement of the State's objective") (citations omitted).[5]

Indeed, there is an irony to Petitioners' argument. In opposing preemption, Petitioners urge that the Safety

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[4] Rather, below Petitioners urged that the statute's purpose was (1) "impossible to evaluate;" and (2) maybe was to prevent injured people from confronting contributory negligence arguments because they didn't buckle up, and so did not justify application of the statutory ban on seat belt evidence to crashworthiness claims. Brief of Appellants at 44. Petitioners said nothing whatever about the purpose they now address: to protect manufacturers from liability when they followed the law's requirements for installing seat belts.

[5] *See also Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992) ("Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational") (citations omitted); *Bowen v. Gilliard*, 483 U.S. 587, 601 (1987) ("A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.") (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)).

Act's "savings clause" permits states to decide for themselves whether to permit common-law juries to judge what seat belts should be installed, and whether the federal restraint system options are appropriate. Pp. 25-28, below. Yet, when Minnesota decides as a matter of state policy not to allow any inquiry into seat belt choices, Petitioners insist that the same savings clause forecloses that state decision: "the Federal government – via the Safety Act and its regulations – now sets the appropriate standards and liability," Petitioners argue. (Pet. 26) "Congress' decision to create universal safety regulations," Petitioners say, "now dictates the appropriate liability." (Pet. 27; *see also id.* at 29) ("[I]t is Congress, not the State of Minnesota, which now prescribes the appropriate seat belts."). Petitioners cannot have it both ways. The Safety Act cannot both let the states decide whether to permit claims, and dictate what decision they make.

As to the argument about timing – the fact that the statute preceded both the Safety Act and crashworthiness liability (Pet. 27) – Petitioners have it backward. The statute set state policy about seat belts, and prohibited seat belt evidence offered by any party, before any crashworthiness cause of action existed. Thus, Petitioners have not been deprived of a crashworthiness cause of action by the statute (Pet. 26); they never had one. Minnesota adheres to the universal rule that the common law may not abrogate a legislative rule. *State v. DeWitt*, 389 N.W.2d 722, 726 (Minn. 1986) ("It is not the function of the courts to frustrate the clearly expressed will of the legislature."). Its adherence to that rule raises no constitutional problem.

Finally, whatever the merits of Petitioners' arguments about Minn. Stat. § 169.685, subd. 4, the issue is not one worthy of review. A decision in this case, either way, would have limited practical effect in Minnesota, and none elsewhere. The constitutionality of a limited application of a Minnesota rule of evidence simply does not

present a substantial question that merits this Court's attention.

II. THERE WOULD BE NO REASON TO REVIEW THE PREEMPTION ISSUE, EVEN IF THERE WERE JURISDICTION.

Over 100 courts – including every federal circuit to address the question,[6] over a dozen state appellate courts,[7]

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[6] *Harris v. Ford Motor Co.*, 110 F.3d 1410 (9th Cir. 1997); *Montag v. Honda Motor Co.*, 75 F.3d 1414 (10th Cir.), *cert. denied*, 117 S. Ct. 61 (1996); *Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir.), *cert. denied*, 498 U.S. 853 (1990); *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990); *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990); *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990); *see also Gracia v. Volvo Europa Truck, N.V.*, 112 F.3d 291 (7th Cir. 1997) (finding preemption of common-law claim under FMVSS 212).

[7] *Zimmerman v. Volkswagen of America*, 920 P.2d 67 (Idaho 1996), *cert. denied*, 117 S. Ct. 1245 (1997); *Cooper v. General Motors Corp.*, 1996 WL 272362 (Miss. May 23, 1996); *Martinez v. Ford Motor Co.*, ___ N.W.2d ___, 1997 WL 341786 (Mich. App. June 20, 1997); *Minton v. Honda of America*, 1996 WL 402070 (Ohio Ct. App. July 19, 1996), *certif. granted*, 670 N.E.2d 1007 (Ohio Oct. 23, 1996); *Cellucci v. General Motors Corp.*, 676 A.2d 253 (Pa. Super. Ct.), *appeal granted*, 684 A.2d 555 (Pa. Oct. 22, 1996); *Dykema v. Volkswagenwerk A.G.*, 525 N.W.2d 754 (Wis. App. 1994), *cert. denied*, 116 S. Ct. 60 (1995), *reh'g denied*, 116 S. Ct. 549 (1995); *Miranda v. Fridman*, 647 A.2d 167 (N.J. Super. Ct. App. Div.), *certif. denied*, 649 A.2d 1291 (N.J. 1994); *Panarites v. Williams*, 629 N.Y.S.2d 359 (N.Y. App. Div. 1995); *Marrs v. Ford Motor Co.*, 852 S.W.2d 570 (Tex. Ct. App. 1993); *Boyle v. Chrysler Corp.*, 501 N.W.2d 865 (Wis. Ct. App.), *rev. denied*, 510 N.W.2d 137 (Wis. 1993); *Nissan Motor Corp. v. Superior Court (Meier)*, 212 Cal. App. 3d 980 (1989), *cert. denied*, 494 U.S. 1066 (1990); *Gardner v. Honda Motor Co.*, 536 N.Y.S.2d 303 (N.Y. App. Div. 1988), *motion for reargument denied*, 74 N.Y.2d 715 (1989); *Wickstrom v. Maplewood*

and scores of federal district courts[8] – have held that the Safety Act and FMVSS 208 preempt claims that a vehicle

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Toyota, Inc., 416 N.W.2d 838 (Minn. App. 1987), *cert. denied*, 487 U.S. 1236 (1988).

[8] *E.g.*, *Courtney v. Mitsubishi Motors Corp.*, 926 F. Supp. 223 (D. Mass. 1996); *Martin v. Ford Motor Co.*, 914 F. Supp. 1449 (S.D. Tex. 1996); *Folkes v. Volkswagen of America*, No. 94-D-977 (D. Colo. June 11, 1997); *Thomas v. General Motors Corp.*, No. 2:96CV38 (E.D. Tex. Dec. 3, 1996); *Marcum v. General Motors Corp.*, No. 93-40 (E.D. Ky. Nov. 21, 1996); *Klugerman v. Nippon Seiko, K.K.*, No. 94-11900-NG (D. Mass. Nov. 20, 1996); *Wiley v. General Motors Corp.*, No. 96-1692 (JHG) (D.D.C. Nov. 15, 1996); *Kaiser v. Fuji Heavy Industries Ltd.*, No. 95-B-633 (D. Colo. Sept. 24, 1996); *Schuyler v. Volkswagen A.G.*, No. 4:96ev25 (E.D. Va. Aug. 28, 1996); *Taylor v. General Motors Corp.*, 1996 WL 671648 (N.D. Miss. Aug. 6, 1996); *Waters v. Ford Motor Co.*, 1996 WL 114791 (E.D. Pa. Mar. 13, 1996); *Sieck v. General Motors Corp.*, 1996 WL 426818 (W.D. Pa. Mar. 5, 1996); *Schroeder v. General Motors Corp.*, No. 8:CV96-591 (D. Neb. Feb. 7, 1996); *Johnson v. General Motors Corp.*, 889 F. Supp. 451 (W.D. Okla. 1995); *Hill v. General Motors Corp.*, No. 94-AR0088-S (N.D. Ala. Nov. 15, 1995); *Beeman v. Lovelace*, 1995 WL 813722 (W.D. Okla. Nov. 2, 1995); *Tammen v. General Motors Corp.*, 857 F. Supp. 788 (D. Kan. 1994); *Gills v. Ford Motor Co.*, 829 F. Supp. 894 (W.D. Ky. 1993); *Heath v. General Motors Corp.*, 756 F. Supp. 1144 (S.D. Ind. 1991); *Cerniak v. Nissan Motor Co.*, 1991 WL 147366 (N.D. Ill. July 26, 1991); *Pak v. Chrysler Motors Corp.*, 1990 WL 198821 (E.D. Pa. Dec. 3, 1990), *aff'd*, 941 F.2d 1200 (3d Cir. 1991); *Dallas v. General Motors Corp.*, 725 F. Supp. 902 (W.D. Tex. 1989); *Hunt v. Ford Motor Co.*, Prod. Liab. Rep. (CCH) ¶ 12,292 (N.D. Ala. Mar. 30, 1989); *Kelly v. General Motors Corp.*, 705 F. Supp. 303 (W.D. La. 1988); *Kolbeck v. General Motors Corp.*, 702 F. Supp. 532 (E.D. Pa. 1988); *Surles v. Ford Motor Co.*, 709 F. Supp. 732 (N.D. Tex. 1988); *Heftel v. General Motors Corp.*, 1988 WL 19615 (D.D.C. Feb. 23, 1988); *Hunter v. General Motors Corp.*, Prod. Liab. Rep. (CCH) ¶ 12,039 (D. Conn. Dec. 27, 1988); *Howard v. American Motors Corp.*, Prod. Liab. Rep. (CCH) ¶ 11,955 (S.D. Tex. July 26, 1988); *Schick v. Chrysler Corp.*, 675 F. Supp. 1183 (D.S.D. 1987); *Staggs v. Chrysler Corp.*, 678 F. Supp. 270 (N.D. Ga. 1987); *Hughes v. Ford Motor Co.*, 677 F. Supp.

is defective because it has one restraint system option granted by FMVSS 208, instead of a different FMVSS 208 option. The Court of Appeals joined that wealth of authority. This Court has declined to review the FMVSS 208 preemption issue eleven times, including one case, based on essentially the same petition, just last March. *Zimmerman v. Volkswagen of America*, 920 P.2d 67 (Idaho 1996), *cert. denied*, 117 S. Ct. 1245 (1997). There is no reason to review it now, particularly in this case.

A. The History Of Federal Regulation Of Restraint Systems.

1. The Safety Act.

In 1966 Congress enacted the Safety Act. The Act directs the DOT and its subdivision, NHTSA, to issue federal motor vehicle safety standards that are "practicable," that "meet the need for motor vehicle safety," and that apply throughout the country. 15 U.S.C. § 1392(a).[9]

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76 (D. Conn. 1987); *Wattelet v. Toyota Motor Corp.*, 676 F. Supp. 1039 (D. Mont. 1987); *Bass v. General Motors Corp.*, 1987 WL 54449 (W.D. Tex. 1987); *Vasquez v. Ford Motor Co.*, 1986 WL 18670 (D. Ariz. Nov. 18, 1986); *Cox v. Baltimore County*, 646 F. Supp. 761 (D. Md. 1986); *Baird v. General Motors Corp.*, 654 F. Supp. 28 (N.D. Ohio 1986); *Vanover v. Ford Motor Co.*, 632 F. Supp. 1095 (E.D. Mo. 1986).

[9] The Safety Act was recodified in 1994 so all "laws related to transportation [appear] in one comprehensive title," and moved from Title 15 to Title 49 of the United States Code. H.R. Rep. No. 103-108, 103d Cong., 2d Sess. 3 (1994), *reprinted in* 1994 U.S.C.C.A.N. 818, 820. In the course of the recodification, there were some "technical improvements" to language to promote "clarity" and "consistency," and avoid "surplusage;" "precautions [were] taken against making substantive changes in the law." *See id.* 49 U.S.C.A. § 30103, Historical and Statutory Notes. The preemption cases and the Petition here discuss the provisions as codified in Title 15 (though some early cases refer

The standards were to be "strong and adequately enforced," and "*uniform* throughout the country." S. Rep. No. 1301, 89th Cong., 2d Sess., *reprinted in* 1966 U.S.C.C.A.N. 2709, 2720 (emphasis added); *see* H.R. Rep. No. 1776, 89th Cong., 2d Sess. 17 (1966).

The Safety Act contains a preemption clause – § 1392(d) (now in 49 U.S.C. § 30103(b)). It permits a state to "prescribe or continue in effect" a "standard applicable to the same aspect of performance of a motor vehicle or item or equipment" as an FMVSS, but "only if the standard is identical" to the FMVSS. Or, as the statute provided before the recodification, "whenever" DOT establishes a federal standard, "no State or political subdivision of a State shall have any authority either to establish, or to continue in effect" "any" state "standard" as to "the same aspect of performance" not "identical to the Federal standard." 15 U.S.C. § 1392(d). The Act also recites that compliance with a federal standard "does not exempt a person from liability under common law." 49 U.S.C. § 30103(e) (1995) (previously in 15 U.S.C. § 1397(k)). But that provision is not denominated a preemption clause; structurally is not part of the preemption clause; and on its face says nothing about preemption, much less purports to preclude preemption of claims based on a non-identical common-law standard that directly conflicts with a federal standard. Pp. 25-28, below.

2. FMVSS 208.

FMVSS 208 is the federal standard governing restraint systems. Options and flexibility have been at the heart of FMVSS 208 for over a quarter century. Beginning in 1971, FMVSS 208 granted manufacturers three options: (1) passive restraints for all crashes; (2) passive restraints

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to § 1397(k) as § 1397(c), its pre-1988 designation). To avoid confusion, we use the Title 15 designations as well.

for head-on crashes plus manual belts; or (3) manual three-point seat belts. 49 C.F.R. § 571.208, S4.1.2.1.-.3 (1971).[10] Passive restraints work without any action by the user; active restraints, like manual belts, require user action – buckling up.

FMVSS 208 did not mandate which form of passive restraint was to be installed by a manufacturer who chose to put in passive restraints. Instead, it set forth performance requirements for those restraint options, and, as to passive belts, provided in effect a fourth option: A manufacturer could install "a seat belt assembly that requires no action by vehicle occupant," that is, an automatic belt system, to "meet the crash protection requirements of any" of the first three options, and *"in place of any seat belt assembly otherwise required by that option."* 49 C.F.R. § 571.208, S4.5.3 (1971) (emphasis added). Thus, a manufacturer could opt to comply with FMVSS 208 by installing passive belts that met the performance requirements of any of its three options, without any manual belts at all.

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[10] In the early 1970s, DOT required vehicles "to carry either passive restraints or [manual] lap and shoulder belts coupled with an 'ignition interlock' that would prevent starting the vehicle if the belts were not connected." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 33, 35 (1983). The public did not like ignition interlocks. Therefore in 1974 Congress enacted 15 U.S.C. § 1410b, which outlawed the "ignition interlock" standard and mandated that manufacturers should have restraint system options, specifically including a manual belt option. Congress also mandated that DOT could grant manufacturers the option to install different types of automatic restraint systems instead of manual seat belts, whatever the "technology may come up with." 120 Cong. Rec. 27822 (1974) (Rep. Wyman, author of amendment that became § 1410b); H.R. Rep. No. 1452, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 6084, 6108.

3. NHTSA's Approval Of The System In The Precis.

"[T]he safety benefits of wearing seat belts are not in doubt. . . . " *State Farm*, 463 U.S. at 52. But many people did not use their belts, and accordingly, beginning in the 1970s, NHTSA sought to encourage passive restraints.

FMVSS 208's Option 2 authorizes passive restraints that, together with manual belts, meet the performance requirements of FMVSS 208, S5.1. FMVSS 208, S5.1 sets forth injury criteria for vehicles hitting a fixed collision barrier at 30 m.p.h., at an angle up to 30 degrees. In 1973, Volkswagen developed a passive shoulder belt system which, with knee bolsters and without any lap belt, met those criteria. It was a real breakthrough. The system outperformed traditional manual lap and shoulder belts; for example, the shoulder belt was not subject to "submarining, in the form of movement of the lap belt [there was none] over the . . . iliac crest into the soft abdominal tissue," a significant advantage. VW Petition for Rulemaking, 208-PRM-14, pp. 7-9 (1973).

In 1974, NHTSA ruled that S4.5.3 specifically permitted the use of the two-point VW system to meet the performance requirements of option two. 39 Fed. Reg. 3834 (1974). As for the lack of a manual lap belt, NHTSA affirmed that S4.5.3 expressly permitted the two-point VW automatic belt system "to replace the required [manual] seat belt assemblies." *Id.* In fact, NHTSA concluded, "option two exists . . . to accommodate the introduction of passive restraint systems like Volkswagen's." *Id.* As NHTSA's Chief Counsel explained "the *'passive belt substitution' provision of S4.5.3* is available to a passive belt system *without a lap belt in place of the lap belt specified by S4.1.3.*" (Hyundai A. 24) (emphasis added).[11]

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[11] That view was stated in a letter, in the public record, that was before the court below, along with others affirming the same thing. (Hyundai A. 15-22) An interpretation of a

Over the years, NHTSA revised FMVSS 208 to require passive restraints, and to eliminate the three-point manual belt option. NHTSA deferred the beginning of the mandatory passive restraint phase-in from time to time, but always preserved the manufacturer's option as to which passive restraint to install. In particular, Secretary after Secretary reaffirmed, protected and praised the option to install the two-point VW system. Secretary Coleman noted that, to date, only "two passive restraint systems" appeared workable, airbags and the VW "shoulder belt and knee bolster system." 41 Fed. Reg. 24070, 24070 n.2, 24072 (1976). Secretary Adams noted that 65,000 VWs were equipped with that system, and lauded it as "a proven means of meeting a passive restraint requirement." 42 Fed. Reg. 34295 (1977).

Therefore, FMVSS 208 expressly authorizes a two-point automatic shoulder belt system with knee bolsters that meets FMVSS 208's performance requirements, and expressly grants a manufacturer the option to use that system "in place of" a standard Option 2 system with lap belts. Indeed, before Secretary Dole mandated a phase-in of passive restraints beginning in 1987, the "vast majority of manufacturers" exercised the option to install manual belt systems, not passive restraints in any form. 41 Fed. Reg. at 24070. The two-point passive belt system was a rare, welcome – and clearly the leading – exception. *Id.* at 24074.

4. Secretary Dole's Final Rule.

In 1984, Secretary Dole undertook a comprehensive review of all restraint systems, 49 Fed. Reg. 28962-63, 28984-86, 28991, 28996 (1984), and reached the final rule that applied to the Precis here. The rule mandated a

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regulation by the agency that adopted it and is charged with implementing it is due "substantial deference." *Martin v. Occupational Safety & Health Comm'n*, 499 U.S. 144, 150 (1991).

phase-in of passive restraints from 1987-90. Secretary Dole determined not to mandate any particular form of passive restraint at any time. She reasoned that each passive restraint system had different virtues, and concluded that mandating a single type of passive restraint would risk "killing or seriously retarding development" of restraint systems. 49 Fed. Reg. at 29001.

Accordingly, Secretary Dole determined to provide "latitude" to industry as to what passive restraints to install. "Flexibility" was the benchmark. *Id.* at 28997, 29000. Thus, manufacturers were to continue to have the same options to comply with FMVSS 208's passive restraint requirements they always had, *id.* at 28997, specifically including the option to choose the two-point VW system. The Secretary noted that, by then, that system had been installed in over 390,000 VW Rabbits (*id.* at 28965); that its usage rate was 50-90% (*id.* at 28984); and, it was available "immediately," of particular importance during the phase-in (*id.* at 28999).

In sum, flexibility and options are the heart of FMVSS 208, and have been for over 25 years. From the beginning FMVSS 208 gave manufacturers the choice of what passive restraint to install in cars with passive restraints, and the final rule granted that same option, specifically including the option to install the two-point system, proven and lauded as it was.[12]

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[12] In 1991, Congress amended the Safety Act to prospectively require airbags in all passenger cars. Congress ordered the Secretary to promulgate an amendment to FMVSS 208 requiring airbags in 95% of all cars built in the 1997 model year, and 100% of cars built in the 1998 model year. *See* Pub. L. No. 102-240, § 2508; 58 Fed. Reg. 46551-02. In amending the Safety Act, however, Congress made clear that its judgment that airbags should be required in the regulations of the future was not to change the preemption case law as to the regulations of the past. Pub. L. No. 102-240, § 2508(d) (amendment "shall [not] be construed by any . . . court as indicating an intention by

Hyundai exercised that federally-granted option and installed the two-point system (actually, an improved version of) it in the Precis. (Hyundai A. 59) Petitioners seek this Court's leave to make that option unlawful, and punish its exercise, after the fact.[13]

B. There Is No Significant Conflict Or Urgency On The Question Whether FMVSS 208 Preempts "No Lap Belt" Claims.

Petitioners' lead argument (Pet. 7) proposes that there is a "growing conflict among the federal courts of appeal[s] and the state courts of last resort over" the question presented in this case: whether the Safety Act expressly preempts "no lap belt" claims. In fact, Petitioners cite only six other cases that have ever considered the issue here – whether "no lap belt" claims are preempted by the Safety Act and FMVSS 208.[14]

Congress to affect, change, or modify in any way the liability, if any, of a motor vehicle manufacturer under applicable law relative to vehicles with or without inflatable restraints").

[13] Actually, Petitioners insisted below that "this is not a no lap belt case." P. Memo in Opp. to Summary Judgment at 1; *see also* Brief of Appellants at 21-24, Reply Brief at 2. Here, in contrast, Petitioners say they claim that the vehicle was defective "because it lacked a driver's-side lap belt." (Pet. 4)

[14] Petitioners cite (Pet. 15-16): *Hernandez-Gomez v. Leonardo*, 917 P.2d 238 (Ariz. 1996) ("no lap belt" claim; no preemption in roll-over accident); *Ketchum v. Hyundai Motor Co.*, 49 Cal. App. 4th 1672 (1996) ("no lap belt" claim not preempted); *Alvarado v. Hyundai Motor Co.*, 908 S.W.2d 243 (Tex. App. 1995), *app. pending*, No. 95-0969 (Tex.) ("no lap belt" claim not preempted; appeal to Texas Supreme Court pending); *Dykema v. Volkswagenwerk AG*, 525 N.W.2d 754 (Wis. App. 1994), *cert. denied*, 116 S. Ct. 60 (1995), *reh'g denied*, 116 S.Ct. 549 (1995) ("no lap belt" claim preempted); *Miranda v. Fridman*, 647 A.2d 167 (N.J. App.), *certif. denied*, 649 A.2d 1291 (N.J. 1994) ("no lap belt" claim preempted).

Instead, Petitioners tally up cases that address different issues. By likening unlike cases, Petitioners suggest a conflict that is more imagined than real.

The Early Cases. Petitioners cite the early case law interpreting the Safety Act, and urge it is in conflict with the Court of Appeals' decision below. (Pet. 8-10) But that case law is not on point, and in fact is entirely irrelevant to the question whether "no lap belt" claims are preempted by FMVSS 208. Most of the cases do not address preemption, or mention it, but concern whether compliance with federal standards is, as a matter of state law, an absolute defense to a state law claim on the merits.[15] Indeed, many of the cited cases involved allegations of defects in vehicles designed and manufactured before *any* pertinent federal safety standards had been promulgated.

Where preemption was at issue, it was a different question entirely – whether the Safety Act occupied the entire field of motor vehicle safety. For example, *Larsen v. General Motors Corp.* concerned steering columns, as to which there was no on-point standard, and addressed only whether Congress had "acquire[d] exclusive jurisdiction in this field." 391 F.2d 495, 506 (1968). Thus, the cases hold, at most, that the Safety Act does not occupy the field, and so permits claims based on common-law standards that do not conflict with an FMVSS; none

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[15] *Knippen v. Ford Motor Co.*, 546 F.2d 993 (D.C. Cir. 1976); *Fox v. Ford Motor Co.*, 575 F.2d 774, 775 (10th Cir. 1978); *Stonehocker v. General Motors Corp.*, 587 F.2d 151, 156-57 (4th Cir. 1978); *Schwartz v. American Honda Motor Co.*, 710 F.2d 378, 383 (7th Cir. 1983); *Shipp v. General Motors Corp.* 750 F.2d 418, 421 (5th Cir. 1985); *General Motors Corp. v. Edwards*, 482 So. 2d 1176, 1198 (Ala. 1985); *Lollie v. General Motors Corp.*, 407 So. 2d 613, 617 (Fla. App. 1981), *rev. denied*, 413 So. 2d 876 (Fla. 1982); *Volkswagen of America, Inc. v. Young*, 321 A.2d 737, 746 (Md. 1974); *H.P. Hood & Sons, Inc. v. Ford Motor Co.*, 345 N.E.2d 683, 688 (Mass. 1976).

involved claims based on standards that directly conflict with an on-point FMVSS.[16]

Certainly none of the cases cited involved passive restraints, or the options and purposes behind FMVSS 208, or the direct conflict between those federal options and purposes and state claims that would take the options away. When the FMVSS 208 preemption issue does come up, the same courts have no problem distinguishing the cases, and finding preemption. *Compare, e.g., Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir.), *cert. denied*, 498 U.S. 853 (1990) ("no airbag" claim preempted), *with Dawson v. Chrysler Corp.*, 630 F.2d 950 (3d Cir. 1980), *cert. denied*, 450 U.S. 959 (1981) (compliance with FMVSS not complete defense to claim that vehicle was defective because of noncontinuous body frame); and *Montag v. Honda Motor Co.*, 75 F.3d 1414 (10th Cir.), *cert. denied*, 117 S. Ct. 61 (1996) ("no airbag" claim preempted), *with Fox v. Ford Motor Co.*, 575 F.2d 774 (10th Cir. 1978) (compliance with federal safety standards not complete defense to claim that rear-seat lap safety belt was defectively designed).

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[16] *See also Dawson v. Chrysler Corp.*, 630 F.2d 950, 957-58 (3d Cir. 1980), *cert. denied*, 450 U.S. 959 (1981) (no federal standard governed frame strength and rigidity); *Dorsey v. Honda Motor Co.*, 655 F.2d 650, 654, 656 (5th Cir. 1981), *cert. denied*, 459 U.S. 880 (1982) (vehicle met "certain federal" standards, but the standards were "unrelated to several of the design deficiencies" challenged); *Sours v. General Motors Corp.*, 717 F.2d 1511, 1516 (6th Cir. 1983) (no federal roof standard established at time car was designed); *Buccery v. General Motors Corp.*, 60 Cal. App. 3d 533, 541 (1976) (federal standard required head restraints for passenger cars, not trucks; plaintiff was injured in a truck; court held Congress had not occupied the field); *McMullen v. Volkswagen of America*, 545 P.2d 117, 120 (Ore. 1976) (no specific standard in issue); *Turner v. General Motors Corp.*, 514 S.W.2d 497 (Tex. App. 1974) (federal standard as to roof strength promulgated after car manufactured).

Thus, none of the early cases addresses passive restraints; or FMVSS 208; or an equipment requirement advanced by plaintiff that NHTSA specifically rejected; or the imposition of liability for exercising an option NHTSA specifically granted; or the direct conflict with federal law if such liability could lie. The cases are not on point, much less grounds for finding a conflict and the need for review.

The "No Airbag" Cases. To suggest mass confusion in the lower courts over the question presented here – and to raise the specter of "thousands of automobile design defect lawsuits pending throughout the nation" (Pet. 15) – Petitioners combine the decisions on the question whether "no airbag" claims are preempted by FMVSS 208 with the "no lap belt" cases. But Petitioners argued below that the "no airbag" cases are off point. The "cases and the[ir] analysis do not apply here," Petitioners urged. Brief of Appellants at 22. In fact, Petitioners derided as "erroneous" the "equation of this case with claims based on the absence of air bags." *Id.* at 18.

This Court has denied certiorari in recent years in every one of the eleven FMVSS 208 preemption cases in which review was sought.[17] In fact, in the most recent

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[17] *See Zimmerman v. Volkswagen of America, Inc.*, 920 P.2d 67 (Idaho 1996), *cert. denied*, 117 S. Ct. 1245 (March 17, 1997); *Montag v. Honda Motor Co.*, 75 F.2d 1414 (10th Cir.), *cert. denied*, 117 S. Ct. 61 (1996); *Tebbetts v. Ford Motor Co.*, 665 A.2d 345 (N.H. 1995), *cert. denied*, 116 S. Ct. 773 (1996), *reh'g denied*, 116 S. Ct. 1036 (1996); *Hyundai Motor Co. v. Phillip*, 639 So.2d 1064 (Fla. App. 1994); *cert. denied*, 513 U.S. 1111 (1995); *Dykema v. Volkswagenwerk AG*, 525 N.W. 2d 754 (Wis. App. 1994), *cert. denied*, 116 S. Ct. 60 (1995); *Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir.), *cert. denied*, 498 U.S. 853 (1990); *Nissan Motor Corp. v. Superior Court (Meier)*, 212 Cal. App. 3d 980 (1989), *cert. denied*, 494 U.S. 1066 (1990); *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990); *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), *cert. denied*, 494 U.S.

case – *Zimmerman* – the petition was the template for the petition here; the arguments here are lifted, verbatim, from that petition. *Compare* Petition for Writ of Certiorari, *Zimmerman v. Volkswagen of America*, No. 96-904 (filed Dec. 1996). Petitioners offer no reason to distinguish this case from *Zimmerman* and the ten other cases in which review was denied. Indeed, this case is far less "certworthy" than *Zimmerman*, because (1) it was decided by an intermediate appellate court (not the highest state court); (2) the judgment rests on an alternative state law ground; and (3) additional cases finding preemption make the decisions, if anything, more uniform than they were last spring.

In sum, review of this case would be an inappropriate use of this Court's limited resources.

C. The Court Correctly Resolved The Preemption Issue.

In finding that the Safety Act and FMVSS 208 preempt claims (like "no lap belt" claims) that would punish the exercise of one of FMVSS 208's options, the Minnesota Court of Appeals joined every federal court to address the question, and a host of state appellate courts. That was plainly correct.

1. Express Preemption.

a. The Meaning Of The Preemption Clause.

This Court's decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), eliminates any doubt about

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1065 (1990); *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1989); *Wickstrom v. Maplewood Toyota, Inc.*, 416 N.W.2d 838 (Minn. App. 1987), *cert. denied*, 487 U.S. 1236 (1990).

whether the safety "standards" referred to in the preemption provision of the Safety Act, 15 U.S.C. § 1392(d), include common-law standards. The Court in *Cipollone* held that a preemption clause forbidding "'requirement[s] or prohibition[s] . . . imposed under State law'" included common law duties. 505 U.S. at 519-24 (plurality) (citation omitted); *id.* at 548-49 (Scalia, J, joined by Thomas, J., concurring in part and dissenting in part.). The Court stated that it made no difference that the preemption clause did not include a specific reference to common-law claims. *Id.* at 521; *see also CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 661-76 (1993).

The Court's holding in *Cipollone* was premised on its long-held view that "[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief." 505 U.S. at 521 (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)); *see also Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 326 (1981) ("A system under which each State could, through its courts, impose . . . its own . . . requirements could hardly be more at odds with the uniformity contemplated by Congress"). And that holding was reaffirmed in 1996 in *Medtronic, Inc. v. Lohr*, where a majority of the Court explicitly endorsed *Cipollone*'s holding that the word "requirements" encompasses state law tort claims for purposes of federal preemption. 116 S. Ct. 2240, 2260 (1996) (Breyer, J., concurring); *id.* at 2263 (O'Connor, J., Rehnquist, C.J., and Scalia and Thomas, JJ., concurring in part and dissenting in part).

Here, the plain language of the Safety Act's preemption clause sweeps at least as broadly as the preempting language in *Cipollone*, and so also encompasses common-law claims like Petitioners'. Section 1392(d) permits state standards "only if" they are "identical" to an FMVSS – or, in the pre-recodification language, the clause takes away "any authority" of a state to enforce a non-"identical" standard. "Any authority" of the state means any state

authority, legislative, executive or judicial; the Act does not say that the legislative and executive branches cannot establish non-identical standards, but the judicial branch can. Common law standards are "standards," as this Court has repeatedly held.[18] Hence a common law action is based upon a "state standard," and must be; otherwise the action would be baseless, literally.

In sum, the state "standards" preempted by § 1392(d) include common-law standards. Petitioners' contrary contention does not merit review by this Court.

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[18] *CSX Transp.*, 507 U.S. at 664 ("Legal duties imposed . . . by the common law" fell "within the scope" of a preemption clause that barred any state "law, rule, regulation, order or *standard*") (emphasis added); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114-15 (1987) (referring to "safety standards" set by California product liability law); *International Paper Co. v. Ouellette*, 479 U.S. 481, 496 (1987) (recognizing the "possibility that [defendant] would have to meet a number of different standards" if sued, under different states' common law); *United Gas Improvement Co. v. Continental Oil Co.*, 381 U.S. 392, 400 (1965) (referring to "common law standards"); *Shenker v. Baltimore & Ohio R.R.*, 374 U.S. 1, 11 (1963) (referring to "negligence standards of the common law"); *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630-31 (1959) (referring to "standard of care" imposed by common law).

Indeed, "standard" in the Safety Act is necessarily at least as encompassing as "requirements" (the *Cipollone* language), because the reference to "requirement" in the third sentence of § 1392(d) would be meaningless otherwise. The third sentence allows states to impose a "requirement" as to vehicles purchased for their use, and so preserves the authority to impose such "requirements"; the first sentence's proscription of "standards" would otherwise have taken away that authority to impose "requirements." Moreover, in *Medtronic*, Justice Breyer uses "requirement" and "standard" synonymously. 116 S. Ct. at 2259.

b. The Meaning Of The Savings Clause.

Petitioners point to the Safety Act's so-called "savings" clause, 15 U.S.C. § 1397(k), and maintain that it shelters all common-law claims – even those that conflict with a federal standard and undermine the purposes behind it – from preemption. That ignores the structure and language of the savings clause, and this Court's teachings on the effect of savings clauses.

As to structure and language, the clause does not mention preemption. Indeed, the so-called savings clause is not denominated a preemption clause and structurally is not part of the preemption clause. On its face, the clause says nothing about preemption, much less purports to preclude preemption of claims based on a non-identical common-law standard that directly conflicts with a federal standard. Instead, it (and some of the legislative history) speaks to "compliance" as a defense.[19] That "compliance" language suggests that the so-called savings clause is not a statement on preemption at all. For as the First Circuit explained, whether compliance is a defense on the merits under state law is "entirely different" from preemption. *Wood*, 865 F.2d at 417. In fact,

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[19] Both the House and Conference Reports contain sections entitled "Preemption," but neither section discusses § 1397(k). *See* H.R. Conf. Rep. No. 1919, 89th Cong., 2d Sess. 16 (1966), *reprinted in* 1966 U.S.C.A.A.N. 2731, 2731-33; H.R. Rep. No. 1776, 89th Cong., 2d Sess. 17 (1966). The House Report mentions § 1397(k) under the heading "Prohibited Acts and Exemption," and the Conference Report does not deal with it at all. Again, if Congress had intended § 1397(k) to be a sweeping exception to the preemption provision, it surely would have described it as such in these reports. *See Chisom v. Roemer*, 501 U.S. 380, 396 (1991). Rather, as its language indicates, § 1397(k) was added merely to clarify that the Safety Act did not create an affirmative defense of compliance with government standards or, as we next show, that the Safety Act was not intended to occupy the entire field of motor vehicle safety.

Petitioners' own cases – and their argument on the state court issue – treat the savings clause as a negation of a compliance defense. Pp. 8-9, above. Moreover, even treating § 1397(k) as a savings clause, on its face the clause "does not express an unambiguous intent to preserve a state suit that conflicts with a federal safety standard." *Wood*, 865 F.2d at 414; *accord Pokorny*, 902 F.2d at 1125; *Taylor*, 875 F.2d at 825 n.18; *see also Schick*, 675 F. Supp. at 1185.

As to this Court's teachings, the Court has never interpreted a savings clause – even one that specifically mentions preemption – to permit state law claims that directly conflict with federal law. For savings clauses are meant "not to nullify other parts of the Act, or to defeat rights or remedies given by preceding sections – but to preserve all existing rights which were not inconsistent with those created by the statute." *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121, 129 (1915). A general savings clause serves to make clear Congress' intent not to "occupy the field." *Chicago & N.W. Transp. Co.*, 450 U.S. at 328 (savings clause included because without it, "it might have been claimed that, Congress having entered the field, the whole subject . . . had been withdrawn from the jurisdiction of the state courts") (quoting *Pennsylvania R.R.*, 237 U.S. at 130).

That is not to say, however, that § 1397(k) is a nullity, or that § 1392(d) preempts every claim "whenever a Federal safety standard is in place." (Pet. 21). Rather, while § 1392(d) expressly preempts conflicting common-law claims, § 1397(k) makes clear that there is no occupation of the field, and expressly preserves all non-conflicting common-law claims, including claims based on manufacturing defects, notwithstanding compliance with federal standards; claims based on state standards, with respect to aspects of performance not covered by federal standards, notwithstanding compliance with federal standards; and claims based on state standards with respect to aspects of performance that are covered by federal

standards, but do not conflict with federal standards, again notwithstanding compliance with those standards. *See, e.g., Buzzard v. Roadrunner Trucking, Inc.*, 966 F.2d 777, 783 (3d Cir. 1992) (federal standard covered lighting on trucks; § 1397(k) saved claims based on common-law standard calling for additional lighting if it did not interfere with light called for by federal standard). In fact, a conflict between a common-law claim and a federal standard is a "rare event indeed." *Wood*, 865 F.2d at 402 n.9.

But when it occurs, a general savings clause cannot be read to save the conflicting state law. Thus in *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), a federal act contained a broad savings clause that purported to save "the remedies now existing at common law or by statute." *Id.* at 446. This Court held preempted an existing but conflicting common-law claim in the face of that savings clause, because a savings clause "cannot in reason be construed as continuing . . . a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act." *Id.* That has been the law throughout this century, even when an act has no preemption clause at all. *See Ouellette*, 479 U.S. at 485, 493-94, 505 (savings clause provided "[n]othing in this section shall restrict any right which any person . . . may have under any statute or common law;" Senate Report said "compliance with . . . Act would not be a defense to a common law action for- . . . damages"; conflicting common law claims preempted; Congress could not have "intended to undermine . . . [the Act] through a general savings clause"); *accord Chicago & N.W. Transp. Co.*, 450 U.S. at 328-31; *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 210-11 (1986); *Arrow Transp. Co. v. Southern Ry.*, 372 U.S. 658, 671 n.22 (1963); *T.I.M.E. Inc. v. United States*, 359 U.S. 464, 473-74 (1959); *Pennsylvania v. Nelson*, 350 U.S. 497, 501 n.10, *reh'g denied*, 351 U.S. 934 (1956); *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080, 1086 (9th Cir. 1979), *aff'd mem.*, 445 U.S. 947 (1980); *see also*

John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86, 99 (1993) (savings clause means that saved state law "generally is not displaced, but 'where [it] stands as an obstacle to the accomplishment of the full purposes and objectives of Congress,' federal preemption occurs") (quoting *Silkwood v. Kerr-McGee*, 464 U.S. 238, 248 (1984)).

Thus, under settled law, § 1397(k) was added to the Safety Act not to defeat the statutory goal of creating a set of nationally uniform motor vehicle safety standards, but rather to indicate Congress' intent not to preempt the remainder of the field of motor vehicle safety not covered by and not inconsistent with those federal standards.[20]

2. Implied Preemption.

Even apart from the preemption clause, and its injunction against non-"identical" state "standards," "no lap belt" claims are impliedly preempted because they conflict with FMVSS 208 and the Safety Act.

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[20] This case is a good example: FMVSS 208 expressly grants, for safety reasons (*see* pp. 13-17, above), a choice among different types of safety restraint designs for automobiles, including the system Hyundai chose here. Section 1397(k) would preserve a common-law claim that a chosen restraint system was negligently manufactured or installed, because those subjects are not addressed by – and do not conflict with – FMVSS or its options. But § 1397(k) would not preserve a common-law claim, like the claim here, seeking to impose liability on a manufacturer for exercising the federally-granted option to install a passive restraint system design approved by NHTSA. That common-law claim conflicts with FMVSS 208 because it extinguishes a choice granted, as a matter of safety policy, by the federal government. *See, e.g., Perry v. Mercedes Benz*, 957 F.2d 1257, 1265 (5th Cir. 1992) (distinguishing failure-to-install-airbag claim from claim that particular airbag system was not properly designed, and holding latter claim not preempted).

Petitioners spend much of the Petition (Pet. 17-22) arguing that this Court's decision in *Cipollone* radically changed federal preemption law and precludes resort to implied preemption analysis in the face of an express preemption clause. But this Court unanimously rejected that proposition as "without merit" in *Freightliner Corp. v. Myrick*, 115 S. Ct. 1483, 1487 (1995); *see also Medtronic*, 116 S. Ct. at 2259 (rejecting express preemption argument but stating that tort claim might "be pre-empted under conflict pre-emption analysis"). The Court went on, in *Myrick*, to consider whether there was implied preemption in that case. 115 S. Ct. at 1488. The Minnesota Court of Appeals here could do – and did – no less.

At the time the 1988 Precis in this case was manufactured, FMVSS 208 gave Hyundai the option to install fully passive, automatic two-point safety belts with no manually-activated lap belts. That was not happenstance. FMVSS 208 permitted that flexibility and granted those options because Congress and the DOT judged that "flexibility in the development of technologies [would] improve automotive safety." *Baird*, 654 F. Supp. at 32; *Minton*, 1996 WL 402070, at *6. Indeed, FMVSS 208 "was specifically designed to give automobile manufacturers a choice among several options when providing restraint systems." *Pokorny*, 902 F.2d at 1123.

Hyundai exercised the option that federal law granted, and installed the federally-sanctioned fully passive two-point belt system in the Precis. Plaintiff's "no lap belt" claim, if allowed, would permit a jury to impose damages on Hyundai because it chose that option, and not a different passive restraint option. That state common-law standard imposing damages on Hyundai for choosing the federally-granted two-point belt option in effect would take away that option and, with it, the manufacturer's flexibility. It also would punish Hyundai, after the fact, for doing what FMVSS 208 authorized.

A state common law rule cannot take away the flexibility provided by a federal regulation, cannot prohibit

the exercise of a federally granted option, and cannot impose damages for doing what a federal act or regulation "authorized [one] to do." *Taylor*, 875 F.2d at 827; *accord Pokorny*, 902 F.2d at 1125; *Martinez*, 1997 WL 341786, slip op. at 3-4; *Minton*, 1996 WL 402070, at *6-7; *Cooper*, 1996 WL 272362, at *5-6; *Cellucci*, 676 A.2d at 260-61; *see also Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 155 (1982). In sum, "a state common law rule that would, in effect, remove the element of choice authorized in [FMVSS] 208 would frustrate the federal regulatory scheme," and so is "impliedly preempted." *Taylor*, 875 F.2d at 827.

Thus, allowing the common-law claim Petitioners propose would "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Ouellette*, 479 U.S. at 491-92. That is what the Minnesota intermediate appellate court found, as over 100 courts have found before it. There is no error, and nothing to review, in that.

CONCLUSION

The Petition for a writ of certiorari should be denied.

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Respectfully submitted,

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